U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 22 August 2007

CASE NO.: 2005-LHC-607
OWCP NO.: 6-190259

In the Matter of:

D. A. W.,
Claimant,

v.

BRADFORD MARINE, INC.,
Employer,

and

SIGNAL MUTUAL INDEMNITY ASS'N, LTD.,
Carrier.

Appearances:

Barry Lerner, Esq.
For the Claimant

Frank Sioli, Esq. and
Lawrence B. Craig, III, Esq.
For the Employer/Carrier

Before: Stephen L. Purcell
Associate Chief Judge

DECISION AND ORDER — DENYING BENEFITS

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("Act" or "LHWCA"), 33 U.S.C. § 901 *et seq.* D.A.W., Jr. ("Claimant") is seeking compensation and medical benefits from Bradford Marine, Inc. ("Employer") and Signal Mutual Indemnity Association, Ltd. ("Carrier") for an alleged work-related hernia which left him temporarily partially disabled since April 2, 2004. *See, e.g.*, Tr. at 10.

A formal hearing was held in this case on September 20, 2006 in West Palm Beach, Florida at which both parties were afforded a full opportunity to present evidence and argument as provided by law and applicable regulations. At the hearing, Claimant offered Exhibits 1

through 8,[1] which were admitted into evidence.[2] Employer offered Exhibits 1 through 29, which were also admitted into evidence at the hearing.[3] Additionally, Administrative Law Judge Exhibits 1 through 3 were admitted into evidence without objection. Both parties subsequently filed post-hearing briefs. After the hearing, and prior to the filing of post-hearing briefs, Claimant died. *See, e.g.*, Cl. Br. at 14; Er. Br. at 2. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent. Although not every exhibit in the record is discussed below, each was carefully considered in arriving at this decision.

I. STIPULATIONS

The parties have stipulated and I find:

1. That the parties are subject to the Act.
2. That Claimant and Employer were in an employee-employer relationship at the time of the alleged injury**.**
3. That the dates Claimant was allegedly injured were 11/23/02 and 6/16/03.[4]
4. That Employer was timely notified of Claimant's alleged injury.
5. That Claimant filed a timely claim.
6. That Employer filed a timely first report of injury and Notice of Controversion.
7. That Claimant's average weekly wage was $515.57.
8. That Claimant's rate of compensation was $343.71.
9. That no compensation was paid to Claimant but medical treatment was authorized by Employer.

Tr. at 5-9; *see also* EX-13.

II. ISSUES

The following unresolved issues were presented by the parties:

1. The nature and extent of Claimant's alleged disability.
2. Whether Claimant's alleged injuries arose out of and in the course and scope of Claimant's employment with Employer.
3. Whether Claimant reached maximum medical improvement.[5]

[1] The following abbreviations will be used as citations to the record: "CX" for Claimant's Exhibit, "EX" for Employer's Exhibits, "JX" for Joint Exhibits, "ALJX" for Administrative Law Judge Exhibits, "Tr." for Transcript, "Cl. Br." for Claimant's Post-Hearing Brief, and "Er. Br." for Employer/Carrier's Post-Hearing Brief.

[2] The only exhibits which are offered by Claimant and not included as part of Employer's Exhibits are CX-4, the deposition of Mr. Kimbro, and CX-8, the vocational report of Susan Lazarus dated August 22, 2006. Tr. at 13-14. Ms. Lazarus' informal notes are included as part of EX-8.

[3] The record was held open for 45 days after the hearing to allow Employer to submit Claimant's Social Security records. Tr. at 16-17. These records were subsequently submitted by Employer as part of EX-25. Employer also submitted post-hearing Claimant's post-injury wage records as part of EX-29.

[4] Employer stipulated to the above-mentioned dates of alleged injury, but not to the fact of injury. Tr. at 7. Employer further noted that there was no OWCP number assigned with respect to the 11/23/02 incident. Tr. at 7.

4. Whether ongoing medical care should be authorized by Employer.[6]
5. Whether Claimant's alleged pre-existing injuries were aggravated or exacerbated by the alleged injuries, or have combined with the injuries, entitling Employer/Carrier to Section 8(f) relief.[7]
6. Whether the doctrine of supervening cause applies.[8]
7. Whether Employer/Carrier was responsible for providing cardiac care for Claimant's underlying condition, which allegedly prevented Claimant from receiving surgical care for his hernia.[9]

ALJX-2, ALJX-3 at 1-3; Tr. at 8-11.

III. STATEMENT OF THE CASE

Testimonial and Non-Medical Evidence

Testimony of D.A.W. (Tr. at 27-91, EX-1, EX-24)

Claimant was deposed on August 1, 2005 (EX-1), again on September 15, 2006 (EX-24), and he testified at the hearing (Tr. at 27). He was 59 years old at the time of the hearing, had received his GED and served twice in the Navy as a machinist in the 1960s and 1970s. Tr. at 27-28; EX-1 at 6. In between his two military tours, he worked at gas stations and in construction jobs. EX-1 at 8-9. After his service in the Navy, he continued to work as a machinist, manufacturing machinery parts. EX-1 at 15, 20. He also worked in quality control positions, inspecting machinery parts. *See* EX-1 at 16-21. Toward the middle of 1998 he was hired by Employer as a machinist and a mechanic, which required him to repair or manufacture "parts" and perform other physical work, such as carrying a 200 pound "coupler" downstairs on his shoulder. Tr. at 28-29; *see* EX-1 at 23-24. During a normal job he lifted heavy objects weighing up to 100 pounds or more. Tr. at 80. His position also required pushing and pulling such objects. *See* Tr. at 80. Before his work-related accidents, he had no conditions or complaints regarding a hernia or abdominal pain. Tr. at 29.

The first work-related incident, which required Claimant to seek medical care, occurred on November 23, 2002. Tr. at 29; EX-1 at 35. While Claimant was helping to remove a boat from the water to bring it in for repairs, he pulled down on a wrench he was handling and suddenly dropped to the ground in pain. *See* Tr. at 29-30; EX-1 at 36-37. He described the pain as if "someone just stabbed me right in the stomach." Tr. at 30; *see also* EX-1 at 37-38. Afterwards, he reported the incident and Employer issued an accident report and sent him to "Workers Comp." Tr. at 31; EX-1 at 38. He was told by Dr. Graham at the Hernia Institute, where he was sent by Employer in January, 2003, that his injury was not severe. *See* Tr. at 31,

---

[5] Claimant passed away from an unrelated cause following the hearing, and no survivors are indicated in the record. Thus, the issues of whether Claimant reached maximum medical improvement is moot.

[6] The issue of whether ongoing medical care should be provided by Employer is also moot because of Claimant's death.

[7] This issue is also moot because of Claimant's death. Moreover, nothing in the record suggests that Claimant's hernia was aggravated or exacerbated by his pre-existing cardiac and pulmonary conditions.

[8] This issue is also moot because of Claimant's death.

[9] Claimant's death precludes the need for such treatment, and this issue is thus also moot.

34; *see also* EX-3 at 7-8. Dr. Graham did not discuss any treatment options with him, nor did anyone else from Employer/Carrier's insurance company. Tr. at 34-35. Claimant only went to the Worker's Comp. Clinic once for this initial injury, and then went back to work for Employer at "light-duty" for a couple of weeks. EX-1 at 39. He then returned to his regularly assigned duties for about six months before he re-injured himself on June 16, 2003 while cutting a piece of steel. Tr. at 31, 70-72, 80; EX-1 at 40. Claimant described the second injury as "the same terrible pain I had experienced before, just like being knifed . . . a very sharp pain right there in your stomach." Tr. at 31-32. Just as with the previous injury, Claimant reported the incident to Employer, an accident report was filed, and Employer sent Claimant to "Worker's Comp." where he was seen by a hernia specialist, Dr. Comperatore. Tr. at 32; EX-1 at 40-41.

Doctor Comperatore recommended that Claimant undergo surgery, and put Claimant through a series of "pre-op" tests. Tr. at 33; EX-1 at 41. After his EKG revealed abnormal results, more tests were performed and Claimant was informed he had a cardiac condition, which he said he "had no clue about." Tr. at 33. He said a catheterization indicated that "only 25 percent of [his] heart muscle [was] still alive and working." EX-1 at 42. According to Claimant, he was told by Carrier's insurance representative that his cardiac condition made it too risky to operate on his hernia. *See* Tr. at 33, 37; EX-1 at 42-43. He was further told that the insurance company would not authorize any type of cardiac care for him. Tr. at 40. He said he still wanted to go forward with the surgery, however. Tr. at 41. He later explained that if he could have the hernia surgery done without risk to his cardiac condition he would "absolutely" do so. Tr. at 52

Claimant testified that he was shocked by the "sorry, tough luck" treatment he received. Tr. at 40. He stated:

> You know, I took a physical to get the job. There was never a mention of a heart thing. I never had a heart attack in my life. I'd never seen a cardiologist or anything like this. And all of the sudden they told me, "Oh, you have this heart problem, we can't do anything to help your hernia because it's too risky." Well, I trusted what they said, you know. But I just didn't expect them to drop me like that.

Tr. at 40-41.

When Employer learned that Claimant could not have the hernia surgery they placed him in a less physically demanding job, which Claimant was able to perform. *See* Tr. at 41-43. During this light duty assignment, Claimant occasionally had to lift at most 20 or 30 pounds, which presented no difficulties for him. Tr. at 81; *see also* EX-1 at 58-61. He said that he also did "propeller repair" during that time period, which he did not consider light-duty work. EX-1 at 61. In April, 2004, Employer told Claimant that his services were no longer required and his employment was terminated. Tr. at 43. According to Claimant, after his first hernia incident, he began to receive "write ups" several times a week from Employer claiming he was "doing something wrong or doing something stupid." Tr. at 44. He said that for the first six years he was employed there, he never received any such disciplinary action, and he was afraid Employer began creating a paper trail to try and get rid of him. Tr. at 44.

Following his termination, Claimant applied for and received Unemployment benefits. Tr. at 44-45. He received approximately $400.00 every two weeks for a six-month period. EX-1 at 66-67. To receive the benefits, he was required to meet with a counselor at a state agency who helped him locate job openings. Tr. at 46. He also found job openings on his own. Tr. at 46. He went on interviews a couple times a week while he was receiving Unemployment, but he did not receive any job offers. Tr. at 47; *see also* EX-1 at 67-68. He said he continued to look for work after receiving Unemployment for six months, and that he "absolutely" wanted to go back to work if he could find a job he was physically capable of performing. *See* Tr. at 52; *see also* EX-24 at 31-32. He explained, "[s]ince I was a kid, 17, I worked all my life, right up until this incident here." Tr. at 52. He said, however, that he had no experience working as a telemarketer and that he was computer illiterate. Tr. at 52-53.

Claimant also applied for and was receiving Social Security Disability benefits. Tr. at 48. He underwent a physical examination and was approved to receive approximately $1,200.00 per month. Tr. at 49; EX-1 at 12; EX-24 at 31. He said the doctor did not specify as to why he qualified for benefits. Tr. at 49; *see also* EX-1 at 68-69. He explained that he would have been willing to give up the disability benefits if he could have found steady employment that he was physically capable of performing. Tr. at 52.

After Claimant's employment was terminated and his case was in litigation, he was told by his attorney that Carrier's insurance company wanted him to see Dr. Young at the Hernia Institute. Tr. at 49-50. He described Dr. Young's exam as follows:

> [The examination consisted of b]asically physically pushing on me. I took off my clothes and he pushed around the middle and checked around the belly button area and so on. He told me the name of it, the medical term. I don't recall, some type of hernia that it was. And just physically, that. No x-ray, no real tests. Just physically checked, "Did that hurt, did that hurt," pushing on it, that type thing like that.

Tr. at 50. Dr. Young did not provide Claimant with treatment recommendations, and Claimant received no report from him. Tr. at 50. Claimant was also sent by Carrier to see Dr. Bilsker, a cardiologist, at the University of Miami. Tr. at 50. He said doctor Bilsker performed tests on him, including a blood test and an x-ray. Tr. at 50-51. Claimant believed Dr. Bilsker was only conducting an evaluation and was not planning to provide him with treatment. Tr. at 51.

Claimant testified that his hernia prevented him from doing "certain bending activities." Tr. at 51. He said:

> If I squat down, it really pulls on that area. And it hurts, not severe like the one when I was working, but just a remind you [sic], aggravated thing.

Ibid. He further stated, "I try to basically sit upright and not do anything, bending, lifting or squatting at the same time. If I'm trying to lift while I'm bent over, I feel it right away, immediately." Tr. at 51; *see also* EX-1 at 46-47. Claimant also testified that he had difficulty standing. He explained, "I just feel like I'm carrying a weight [on my back] . . . that's the best way I can describe it to you." EX-1 at 48.

On cross-examination, Claimant affirmed that the medical care he was receiving at the time of the hearing had nothing to do with the hernia-related work incidents from 2002 and 2003. Tr. at 54-55; *see also* EX-24 at 7-25. His recent hospitalizations dealt solely with his heart problems, and he made no complaints about his hernia while in the hospital. Tr. at 59. He further affirmed that he had only been to one doctor, Dr. Comperatore, on one occasion to seek treatment for his hernia.[10] Tr. at 55. Claimant also stated that he took no medications for his hernia—the only medications he was then taking were for his heart, edema and pulmonary problems. Tr. at 55, 62-64; EX-1 at 34-35.

Claimant stated that he used to enjoy shooting pool, but had difficulty playing because the "bending and straightening up" impacted him "where the hernia [was]." Tr. at 62. He then stated, however, that the problems he had with his pool game were due to his heart and lung conditions. Tr. at 62. When he was asked whether his edema caused him difficulty walking, Claimant said it did not. Tr. at 65. However, Employer's attorney then reminded Claimant that during his deposition a few days earlier Claimant attributed his pain when walking to his edema and swollen lower extremities. Tr. at 67. Claimant then agreed with Employer's attorney that edema was the cause of his pain while walking. Tr. at 67.

Claimant stated that throughout the course of his claim, he was never told by anyone, including his attorneys, that he had an option to have the surgical procedure for his hernia under a local anesthetic.[11] Tr. at 68. He said that he never asked for, nor was he provided with, any reports from independent medical examiners. Tr. at 68. He further testified that he never sought out another doctor for his hernia situation, other than the ones he was sent to by Employer. *See* Tr. at 68-69. He said that his heart, lung and edema conditions had gotten worse since he was informed of them by Dr. Comperatore. Tr. at 69.

The following exchange ensued when Claimant was questioned as to who provided him with suggested job openings after he was terminated by Employer:

> Q Incidentally, do you remember visiting with a gentleman by the name of Mr. Garthwait regarding an attempt to find you gainful employment following the second episode?
>
> A I can't think of who it is.

[10] Although Claimant was also seen by Drs. Young and Graham, those visits were strictly for evaluation purposes, not for treatment. Tr. at 55.

[11] The Court notes that during Claimant's deposition on August 1, 2005, he stated that someone told him "they could use needles to inject around the site they were going to work in and so forth like that. I heard that. I don't recall who that was." EX-1 at 66.

Q Do you remember seeing a gentleman and talking to him about re-employment?

A I can't recall.

Q Were you ever provided by this lady who was here earlier this morning, Ms. Lazarus, or anyone, outside of what you've told this court as it pertains to the Unemployment effort when you were seeking benefits, about jobs that might be available for you?

A I spoke with her.

Q Okay. Did she provide you with any suggestions at all about employment?

A I got the impression she was trying to see what I might be able to be qualified for, to do.

Q Did she provide you with any job recommendations or positions that you might attempt to obtain?

A I don't recall that. I don't think so.

Q Do you remember meeting with any gentlemen in that same area of expertise who suggested job opportunities for you?

A I thought it was just her.[12]

Tr. at 73-74.

Claimant testified that no doctor had told him that his heart, lung or edema condition was related to his having smoked cigarettes for over 30 years. Tr. at 74. He stated that he stopped smoking three weeks prior to the hearing, although he was in the hospital for two of those weeks after having a defibrillator and pacemaker inserted. *See* Tr. at 75. At the time of the hearing, Claimant had doctor appointments scheduled with his cardiologists, however he had no appointments with any physicians regarding his hernia complaints. Tr. at 78.

On re-direct examination, Claimant explained that he lost his health insurance after he was terminated by Employer, and his sole source of medical care was through the Veteran's Administration. Tr. at 82.

[12] The Court notes that during his deposition on August 1, 2005, Claimant said that he had recently met with Mr. Garthwait, and that Mr. Garthwait offered to help him locate a new job. EX-1 at 65. He described Mr. Garthwait as "very nice" and said that he spoke with him "at some length." EX-1 at 65.

Testimony and Reports of Susan Lazarus (Tr. at 93-127, EX-7, EX-8, CX-8)

Susan Lazarus was deposed on September 28, 2005, EX-7 at 261, and she testified for Claimant at his hearing. *See* Tr. at 93. She is certified as a vocational rehabilitation counselor, a vocational evaluator, a disability management specialist and as a case manager. EX-7 at 265. She works for both the Florida Division of Workers' Compensation and the United States' Department of Labor's Office of Workers' Compensation. Tr. at 93. She receives approximately ten Federal Longshore case assignments per year, and approximately ten from the State of Florida. Tr. at 93. She also receives cases directly from carriers. Tr. at 93-94. In addition, she estimates that she has been involved in thousands of Social Security hearings. Tr. at 94. Ms. Lazarus said that this is the first time she has worked with Claimant's attorney or his law firm. EX-7 at 266.

Ms. Lazarus met with Claimant and performed a series of vocational assessment tests. Tr. at 95; EX-7 at 267-70; EX-8 at 328-29, 347-351. She submitted a "Vocational Report," dated August 22, 2006. CX-8. Ms. Lazarus considered it "unusual" that Claimant received Social Security disability benefits so quickly, after just one doctor's examination and without any court proceedings. Tr. at 97. She stated that she does not believe Claimant had transferable skills to do sedentary work. Tr. at 98. She thinks he had limited transferability to perform light-duty jobs, "[b]ut he might have to make some adjustment in terms of the work tools he might have to use, the work field, the work setting." Tr. at 99.

Her report noted that pursuant to Social Security Disability guidelines, Claimant, at 59 years of age, "would not be expected to have to make more than a minimal adjustment in tools, materials and products used at his job. He also would not be expected to look for work outside of his work field and industry." CX-8 at 10. She testified that if Claimant was able to do light work, he could have worked as a gate guard or a security guard. Tr. at 100. She said that a job in telemarketing would not have been appropriate for Claimant as he had no previous sales experience. Tr. at 101. She further stated that there was a machinist position available that, with some modifications, Claimant probably would have qualified for; however the position had since been filled. Tr. at 102. She said that she did not believe that Claimant had the physical ability at that point to go to work eight hours a day five days a week. Tr. at 102. She said, "as a vocational expert, combined with the cardiac condition where he has limitations and he's had recent surgery, I would be uncomfortable at this point sending him off on jobs that are even sedentary because I'm not clear what exactly he can and can't do." Tr. at 103.

On cross-examination, Ms. Lazarus said that when she first evaluated Claimant in April, 2005, he told her that he thought his health was deteriorating. Tr. at 107. He further told her that he was receiving cardiac treatment at the VA, and that he was waiting to find out if he could undergo hernia surgery with general anesthesia. Tr. at 107-108. She said, however, that Claimant was not actively treating his hernia at the time. Tr. at 108. She also stated that the physical symptoms Claimant complained of at the time were more closely related to his cardiac condition than to his hernia. *See* Tr. at 109-111. She noted her confusion over whether his standing limitations were due to his hernia or cardiac condition. Tr. at 111-112. She stated, "as a vocational counselor, I'm . . . put in a little of a bind because I don't want to put [Claimant] in harm's way by suggesting he can stand, if in fact, standing is a limitation. But it's just not

specifically identified like I would prefer it to be." Tr. at 112; *see also* EX-7 at 278-81. She said that Claimant specifically said lifting also caused a problem for his hernia condition, Tr. at 112-113, and that "if he does any exertion he is completely exhausted. EX-7 at 274.

Ms. Lazarus stated that Claimant was on even more cardiac medications at the time of the hearing than when she saw him in April, 2005. Tr. at 114. She said Claimant had complained of drowsiness, but that there was no indication the drowsiness was caused by his hernia. Tr. at 114. Claimant had not indicated to her whether he had added any hernia medications to his regimen since she saw him in 2005. Tr. at 114. Her report, dated August 22, 2006, states that Claimant was not seeing anyone for his hernia. CX-8 at 3.

Ms. Lazarus agreed that Dr. Bilsker's deposition released Claimant to do whatever work he felt comfortable doing on a cardiological basis. Tr. at 115. She said that when she met with Claimant back in April, 2005, she assessed Claimant's hernia and cardiac conditions together and concluded that he was unable to work in a sedentary type job. Tr. at 116-118. She agreed that Dr. Young did not initially place any restrictions on Claimant's lifting capabilities, but said he did seem to indicate such restrictions in his subsequent deposition, which she read the morning of the hearing. Tr. at 118-120.

Ms. Lazarus was then asked if the real reason for Claimant's inability to secure employment since his termination was his cardio-pulmonary condition, rather than his hernia condition. Tr. at 121. She responded that although she does believe Claimant had limitations from his hernia conditions, she does "think that the cardiac condition complicates things tremendously to where it's hard to flush out exactly what restrictions are related to what." Tr. at 122. She said it is fair to say that even if Claimant had the hernia repaired, he would still face cardiac challenges in trying to resume employment. Tr. at 122-123. She then said, "[b]ut from everything I'm reading, I think that there's a reluctance to repair the hernia without improving his function to the point where he can sustain the surgery. So I almost think that one would have to come before the other." Tr. at 123. She further testified that other than calling the jobs Mr. Garthwait found for Claimant, she did not affirmatively call any employers to look for work for Claimant. Tr. at 125.

Testimony and Vocational Reports of Edward Garthwait (Tr. at 129-171, EX-11)

Edward Garthwait testified for Employer. Tr. at 128. He said he has worked as "a certified disability management specialist, rehabilitation provider" since 1985, and that he meets with claimants to determine their ability to return to work. Tr. at 129. He earned his bachelor's degree from the University of South Florida, and is Board-certified as a disability management specialist and a qualified rehabilitation provider for the State of Florida. Tr. at 130. He is an accepted expert in vocational rehabilitation in Florida workers' compensation cases. Tr. at 130.

Mr. Garthwait has worked with Lamorte Burns, Carrier's insurance company, on "a few files" in the past and has also worked with Employer/Carrier's law firm on a few occasions. Tr. at 37, 130-131. He said that most of his practice stems from Employer/Carrier referrals, as opposed to Claimant referrals; and that he works for the state of Florida as a subcontractor. Tr. at 131.

He became involved in Claimant's case when he received a request for a labor market survey, and he issued his first report on April, 27, 2004. Tr. at 130-131; EX-11 at 612. He explained that he was given little time to generate the report and that he was not provided with Claimant's complete medical, educational and employment background prior to generating it. Tr. at 132; EX-11 at 613-14. Based on Claimant's physical limitations due to his hernia, he looked for alternative employment for Claimant that involved sedentary to light duties. Tr. at 133-134. Suitable positions he found for Claimant included shift manager for Boston Market, a customer service position for a marketing company, a mechanical assembler for a staffing company, and three other positions in customer service, sales and management. Tr. at 134; EX-11 at 614-15. Mr. Garthwait said that the potential employers knew that Claimant would not be able to lift anything heavy due to his hernia. Tr. at 134. He concluded his survey stating, "it is seen that employment opportunities *are* available within the client's educational level and physical abilities from employers that are currently hiring in [his] immediate geographical area." EX-11 at 615.

Since he submitted his report in April, 2004, Mr. Garthwait has reviewed additional medical records of Claimant, including those of Drs. Bilsker, Young and Barron. Tr. at 135. He has also since reviewed the depositions of Claimant and Drs. Bilsker, Young and Graham, and had the opportunity to meet with Claimant. Tr. at 135. Armed with this additional information, he still feels that Claimant could have performed the jobs he identified for him back in April, 2004. Tr. at 135-136. Mr. Garthwait said that Dr. Comperatore would not provide any job restrictions or limitations on Claimant. Tr. at 136; *see* EX-11 at 616. Dr. Comperatore told him that "he saw the patient only once, and that surgery was cancelled." Tr. at 136.

Mr. Garthwait's next reports were generated on June 27, 2005 (EX-11 at 629) and August 26, 2005 (EX-11 at 633). Tr. at 136. In both reports, he listed several alternative employment positions that Claimant could have qualified for in terms of skill-level. *See* Tr. at 138-148. He stated that Claimant's military background would be an asset in the security field. Tr. at 138. He described Claimant's previous job as a mechanic/machinist as a position that did not have a lot of transferable skills; however he said that Claimant's jobs as a quality control inspector yielded Claimant "more skills." Tr. at 139. He stated that the secret clearance Claimant obtained in yet another position "would be something that would be good in transferring him to an employer who was interested in hiring him for a security position." Tr. at 140.

At the time Mr. Garthwait saw Claimant, Claimant was not receiving treatment for his hernia. Tr. at 141. He said that Dr. Young indicated that Claimant had no work restrictions based on his abdominal examinations, but "he might have limitations based on his cardiac history," and that he would have been able to go back to his former employment with Employer. Tr. at 141-142. He stated, however, that Dr. Comperatore reported in 2005 that Claimant was to avoid heavy lifting and "to fix the hernia before coming back to work activity with more than 25 pounds of lifting." Tr. at 142. Mr. Garthwait said that the potential jobs he identified for Claimant fell within the restrictions given by Dr. Comperatore. Tr. at 142. He further stated that Claimant would have been qualified for the positions he identified in his labor market surveys as they did not require transferable skills. See Tr. at 143.

Mr. Garthwait completed his next report, a "Reemployment Assessment," on July 24, 2006 (EX-11 at 640). *See* Tr. at 143, 145. The report considered the medical evaluations of Doctors Cardella, Bilsker, Young, Comperatore and Barron. EX-11 at 644-45. It also took into consideration the vocational report that Susan Lazarus had generated. *See* Tr. at 144. He noted that she listed several of Claimant's subjective complaints, including "shortness of breath, limited circulation, blood flow, not able to do much lifting, squatting, stooping, bending, crawling. I think his walking is also limited." Tr. at 144-145. He said he believed these complaints concerned Claimant's cardiological condition. He further stated that the "transferability of skills section" of his report, on page 14, is consistent with his earlier report regarding the skills Claimant had from his military experience and previous jobs. Tr. at 146. The only thing he had previously forgotten to mention was Claimant's experience using a forklift. Tr. at 146.

Mr. Garthwait noted that after he advised Claimant of the different ways to proceed to find employment, Claimant said that he would contact him at a later time. The "Motivation" section of his report stated, "at the time of this writing it has been one year and [Claimant] has not asked for any vocational assistance." EX-11 at 650. Finally, the report concluded that Claimant's "disability does not cause a vocational handicap to the labor market other than this individual being restricted to sedentary to light duty as opposed to the medium level of work the individual was performing at the time of the injury." EX-11 at 656.

His next report, a labor market survey, was submitted on August 10, 2006 (EX-11 at 671). Mr. Garthwait stated that Claimant had the skills to perform a "Class D unarmed security type job" and telemarketing jobs listed in the report. Tr. at 148; EX-11 at 676-677. The report also listed a machinist position that would have been suitable for Claimant. EX-11 at 678. In addition, Mr. Garthwait submitted an addendum to the report, which also listed jobs that Claimant could have performed within the restrictions given by Dr. Comperatore. Tr. at 148; EX-11 at 679-80. He testified, "there's no heavy lifting in these positions. And so therefore, it would appear to fit his needs. . . . Again, there's no transferable skills that would be required because these are entry level positions that you're kind of in on the job training when you begin working." Tr. at 148-149. He stated that Claimant never contacted any of the potential employers provided to him, and said such inaction may indicate "whether or not [Claimant's] interested in returning to work or making an effort to return to work."[13] Tr. at 149.

Mr. Garthwait believed that Claimant was receiving Social Security Disability at the time of the hearing. Tr. at 149. He reviewed the recent depositions of Drs. Graham and Young, regarding Claimant's hernia, and Dr. Bilsker, regarding Claimant's cardiological condition. *Ibid*. He also reviewed Claimant's updated deposition. *Ibid*. Based on the latest information, Mr. Garthwait's understanding is that since last year "[Claimant] had a heart attack and then had to be hospitalized and have a pacemaker, defibrillator implanted." Tr. at 150. He said he understands Claimant to be having physical restrictions with respect to his cardio-pulmonary

[13] Later in his testimony, Mr. Garthwait stated that he knew Claimant did not call the potential employers because he placed "follow-up telephone calls . . . to confirm whether or not he's presented." Tr. at 168. He said that in some circumstances he received fax verifications from the potential employers. Tr. at 168. He made his follow-up inquires within a few weeks of his labor market survey report; no follow-up with the employers was made after that point. Tr. at 168-169.

condition. *Ibid*. Based on all the records he has looked at, Mr. Garthwait said that Claimant's cardio-pulmonary condition has been more vocationally limiting for Claimant than his hernia. *Ibid*.

On cross-examination, Mr. Garthwait stated that this is the first time he has testified as an expert in a Longshore proceeding. Tr. at 154. He is not on the list of approved vocational evaluators by Longshore, nor does he have the "certified rehabilitation counselor" credentials that Ms. Lazarus has. *Ibid*. He also said that he does not have certification as a "certified vocational evaluator" or a "certified case manager." Tr. at 154-155.

Mr. Garthwait said that he never received responses from various doctors regarding his requests to obtain written restrictions for Claimant. Tr. at 155. He made no attempt to meet with the doctors, and he based his understanding of Claimant's restrictions upon the deposition testimony and records provided to him by Employer's attorney. *Ibid*. He further stated that he is aware that the State of Florida only gives employment benefits to people who are "looking for work while receiving benefits" and that Claimant was receiving such benefits. Tr. at 155-156. However, he made no attempt to get any records of the job contacts Claimant made from the State's unemployment office or from the Work Force One agency. Tr. at 156. He said that based on Claimant's testimony, "[i]t would appear that he tried to contact several employers, but was not hired." Tr. at 157.

Mr. Garthwait stated that Claimant had a good employment record with Employer. Tr. at 157. He was unsure why Employer terminated Claimant in April, 2004. *Ibid*. He said he understood Dr. Comperatore's restrictions to be "no lifting" of anything over 25 pounds, losing weight and limited physical activity. Tr. at 158-159. He said he found the restriction of "limited physical activity" vague, however he did not follow up with Dr. Comperatore for clarification. Tr. at 159. Moreover, he said he prepared his initial labor market survey without meeting Claimant and without getting medical reports as to Claimant's restrictions. *Ibid*. He noted that this dearth of information made it difficult to form a professional opinion, and stated:

> I had to take an assumption of what restrictions and limitations might be given to somebody that had a hernia with . . . no heavy lifting, that type of thing. And I also assumed that he had a high school education. And then if things had changed or I learned otherwise, then my opinion might change.

Tr. at 160.

Mr. Garthwait said that in essence his first report was a guess. Tr. at 160. He also admitted that the report contained several typos regarding the addresses of the potential employers he listed. *See* Tr. at 161-164. He stated that although Claimant told him he had tried, and failed at sales positions, "he may have gained more confidence [since then] or that could have changed, given the fact he now has restrictions and limitations to consider." Tr. at 165. He then stated, "given [Claimant's] recent chain of events with his heart, I'm not so sure that he can return to work." Tr. at 166.

Testimony of Lourdes Mendez (EX-21)

Lourdes Mendez was deposed by Claimant on September 7, 2006. EX-21 at 2. At the time of the deposition she had been employed by Lamorte Burns for a year and two months. EX-21 at 4. She had assisted in Claimant's claim for compensation since August, 2005 and took full charge of it in April of 2006. *Ibid*. She testified that no indemnity benefits had been paid to Claimant because "[h]e never lost any time." EX-21 at 5.

She said Claimant earned an average weekly wage of approximately $515.00, which would equal a monthly payment of approximately $2,100.00. EX-21 at 6. According to her, the company bases a claimant's wages earned "on the average weekly wage 52 weeks prior to the accident." EX-21 at 7-8. She further stated, "because [Claimant] was laid off for lack of work there was no reason for us to require any further wages after the accident." EX-21 at 8. Her records indicated that Claimant did not lose any wages while working for Employer from June of 2003 until his separation in April of 2004. EX-21 at 6-7.

Ms. Mendez said that Drs. Comperatore, Young and Graham were the only doctors on record for this claim. EX-21 at 8-9. Drs. Young and Graham were on record as being IMEs, or second opinions, and Carrier never authorized them to provide treatment to Claimant. EX-21 at 9. She further testified that Carrier and counsel for Employer/Carrier never advised Claimant or Claimant's counsel that a less invasive procedure than that authorized by Dr. Comperatore would be authorized for Claimant. EX-21 at 9-10.

Testimony of Terecita Reyes (EX-22)

Terecita Reyes was deposed by Claimant on September 7, 2006. EX-22 at 2. She is the executive administrator for Employer and handles administrative office work, billing, human resources and payroll. EX-22 at 4. She was hired in October, 2004 and thus has no personal knowledge of Claimant. EX-22 at 5. Her records indicated that Employer prepared an accident report for Claimant (an LS 202) dated June 24, 2003. *Ibid*. After the accident, Claimant continued to work for Employer as a mechanic in the machine shop. *Ibid*. Her payroll records indicated that Claimant continued to earn the same weekly wages that he was earning prior to the accident. EX-22 at 6-7.

She further testified that her records indicated Claimant was laid off on April 2, 2004 due to "lack of work." EX-22 at 7-8. She said that she had not seen any documentation about the lack of work the company had around that time. EX-22 at 8. She was unsure as to whether Claimant had been offered any type of employment with the company since April, 2004. *Ibid*. She said Employer is a "seasonal employer" and that April is usually a slow month for them. EX-22 at 8-9. According to her, Employer has re-hired employees that were terminated during the slow periods, but she was unaware if that had been done in 2004. EX-22 at 9.

Deposition of Thomas Kimbrough (CX-4)

Thomas Kimbrough was deposed by Claimant on August 1, 2005. CX-4 at 1-2. Mr. Kimbrough works for Carrier's insurance Company, Lamorte Burns, and oversees the handling

of Claimant's claim. CX-4 at 3. He testified that he did not know what, if any, medical benefits had been paid on the claim, and he did not believe any indemnity benefits had been paid. CX-4 at 4, 8.

Mr. Kimbrough testified that Claimant's file did not reflect that Claimant lost any time from work from the time of his accidents up until October 25, 2003. CX-4 at 6. He further testified that Carrier had calculated Claimant's average weekly wage from June 24, 2002 through June 16, 2003 to be $515.57. CX-4 at 7-8.

Mr. Kimbrough testified that at the time of the deposition he was unaware whether or not Claimant had chosen his own physician. CX-4 at 8. He was also unaware whether anyone had informed Claimant that he could choose a physician of his choice. CX-4 at 8-9. He said that Carrier had not informed Claimant of his ability to choose his own doctor. CX-4 at 9. He further testified that he was unaware of whether Claimant was offered any type of light duty work by Employer after his termination. CX-4 at 9-10.

Medical Evidence

Social Security Administration (SSA) Records (EX-25)[14]

Included within this exhibit is a March 21, 2005 report of Dr. Samuel Rand, who examined Claimant on that date on behalf of the SSA. EX-25 at 11-13. Dr. Rand reported Claimant's medical history to include the following: hypertension, congestive heart failure, shortness of breath after walking one block, and a work-related abdominal hernia, which resulted in the pre-operative tests that unveiled his cardiomyopathy. EX-25 at 11. Claimant's "review of systems" included constant shortness of breath, and intermittent chest pain "without rhythmecity." EX-25 at 12. An examination of Claimant's abdomen revealed umbilical hernia, however the hernia was not listed in Dr. Rand's ultimate impression. EX-25 at 12-13. Rather, Dr. Rand diagnosed Claimant with: "1. Cardiomegaly with reduced ejection fraction; 2. Status post-congestive heart failure; 3. Hypertension; 4. Semi obesity." EX-25 at 13.

[14] This exhibit contains medical, as well as non-medical, evidence. Two separate "Disability Determination and Transmittal" forms are included in this exhibit. Both were executed by Disability Examiner Mabel Elias on March 29, 2005 and signed by a Social Security Administration representative on April 6, 2005. EX-25 at 2-3. The first form notes that Claimant's disability began on April 1, 2004. EX-25 at 2. The form indicates that Claimant's primary diagnosis was cardiomyopathy and his secondary diagnosis was chronic pulmonary insufficiency. EX-25 at 2. The second form notes that Claimant's disability began on January 1, 2005. EX-25 at 3. It also indicates that Claimant's primary diagnosis was cardiomyopathy and that his secondary diagnosis was chronic pulmonary insufficiency. EX-25 at 3. Another SSA record further notes that Claimant stopped working on April 1, 2004 because his cardiological and pulmonary conditions prevented him from performing his job. EX-25 at 4. A different record dated March 29, 2005, the "Decision Worksheet," indicates that Claimant reported pain "of a severity that interferes with daily functioning," and that the combination of his impairments impacted his "physical/mental functional capacity." EX-25 at 6. The same form notes that the vocational rule 210.2 applied, and the finding of "Disabled" was directed. EX-25 at 8. It further indicates that Claimant's "[p]ast work was semi-skilled/skilled, but [was] not transferable." EX-25 at 8.

Deposition and Records of Dr. Howard Barron (EX-2) / Records of Memorial Regional Hospital (EX-16[15])

Dr. Howard Barron was deposed by Employer/Carrier on August 2, 2005. EX-2 at 1, 3. He is a cardiologist licensed to practice in Florida, however he is board certified only in internal medicine. EX-2 at 3. Dr. Barron evaluated Claimant on August 12, 2003 after Claimant was referred to him for a cardiac consultation by Dr. Beth Braver. EX-2 at 4. At the consultation, Claimant's major complaint was that he had been short of breath for months. EX-2 at 5. He said that Claimant brought with him to the appointment an ultrasound of his heart taken on July 22, 2002. EX-2 at 6. The ultrasound showed "a reduced ejection fraction of 20 percent with an enlarged heart." EX-2 at 6. He explained such a finding is consistent with a weakened heart muscle—in this case Claimant's heart muscle strength was reduced to 20 percent. EX-2 at 6. Dr. Barron was unsure as to when or why Claimant's heart began to function poorly. EX-2 at 6-7.

Dr. Barron said that Claimant reported breathlessness with any exertion. EX-2 at 7. Claimant also reported that he was a heavy smoker and had a family history of heart disease. *Ibid*. He told Dr. Barron that he had a gastrointestinal bleed due to aspirin about a year prior to the visit. *Ibid*. Dr. Barron testified that smoking could have a "significant" impact on someone with a cardiovascular condition, but he said that smoking alone would not cause a weakened heart muscle like Claimant's. *Ibid*. He explained that smoking "would make somebody short of breath, but it wouldn't give them an ejection fraction of 20 percent." *Ibid*. He testified, however, that depending on the number of years someone has smoked, he could develop chronic bronchitis or emphysema, "which could significantly reduce [his] ability to ambulate and to function properly." EX-2 at 8. Dr. Barron also explained that Claimant is at risk for having coronary artery disease due to his family history. *Ibid*.

Dr. Barron testified that Claimant's physical condition on the day of his evaluation was as follows: "His blood pressure was a little high at 135 over 95. He had a slight systolic heart murmur. . . . Nothing else remarkable." EX-2 at 8. During the evaluation, Claimant underwent a stress test, which again indicated Claimant's weakened heart muscle but did not show any blockages of his coronary arteries. EX-2 at 9-10. Dr. Barron thus concluded that Claimant did not have coronary disease; rather his weakened heart muscle stemmed from another cause. EX-2 at 10-11. Claimant also underwent an echocardiogram that further indicated a weakened heart muscle. EX-2 at 10. Dr. Barron concluded his report by recommending a cardiac catheterization and noting that Claimant "has a cardiomyopathy[16] and is able to work in light to moderate work as a mechanic." EX-2 at 12-13. By recommending that Claimant perform only light to moderate work, Dr. Barron meant that Claimant "shouldn't be a full mechanic lifting 100 pounds or something real heavy. He should be . . . probably lifting less than 20 - 25 pounds. Not working in 100 degree heat. . . . He can't do a lot because he doesn't have much of a heart left." EX-2 at 13-14. Dr. Barron testified that he saw "absolutely" no link between the onset of Claimant's hernia and his cardiological condition. EX-2 at 15.

[15] The Court notes that many of Dr. Barron's records of Claimant were apparently combined with this exhibit in addition to being included in EX-2, which is designated as "Deposition - Dr. Howard Barron."
[16] In laymen terms, a cardiomyopathy is a weakened heart muscle. EX-2 at 6.

Dr. Barron explained that there are many medications that could have helped with Claimant's heart condition including "beta-blockers; ARBs; ACE inhibitors; diuretics." EX-2 at 14. He said that potassium might also be taken in combination with a diuretic. *Ibid*. Dr. Barron never cleared Claimant for hernia surgery, and if Claimant were to have undergone surgery he would not have recommended the use of a general anesthetic. EX-2 at 14-15. He opined that Claimant "probably could handle a local under the right circumstances." EX-2 at 15. Along with a local anesthetic, an epidural or a spinal anesthesia might also be acceptable. EX-2 at 21. He explained that such a decision is up to each surgeon individually, and that some surgeons prefer their patients to be "out" to prevent movement during surgery. EX-2 at 20. As a cardiologist he would have been wary of using a general anesthetic on Claimant. *Ibid*. He explained as follows:

> When you have a cardiomyopathy, you don't want to put people under general anesthesia unless you really, really have to, such as a major operation like some spinal operations or something really major, brain operations . . . . If you have a choice, especially for anyone with some type of a heart condition, you don't want to put them under general anesthesia.

Ibid. He said that had Claimant's surgeon indicated that he would only perform Claimant's hernia surgery under general anesthesia, he would have told Claimant to find another surgeon. EX-2 at 21.

Dr. Barron referred Claimant to Memorial Regional Hospital for a cardiac catheterization. EX-16 at 701, 710. The procedure was performed on August 20, 2003 by Dr. Michael Marek. EX-16 at 710. Dr. Marek's physical examination of Claimant found Claimant to be in "no acute distress," and to have a "[g]rade 2/6 systolic [heart] murmur at the left sternal border." EX-16 at 701. Claimant's EKG showed "a sinus rhythm with an intraventricular conduction defect and a possible old anterior wall infarction." EX-16 at 701.

Other records within the exhibit indicate that Claimant had several follow-up appointments with Dr. Barron. The first was on August 25, 2003. EX-16 at 704. Dr. Barron noted that Claimant's chief complaint was depression. *Ibid*. His assessment of Claimant included cardiomyopathy and congestive heart failure. *Ibid*. He recommended that Claimant continue to perform light to moderate work as a mechanic. EX-16 at 705. Dr. Barron saw Claimant again on August 29, 2003 for a blood pressure check. EX-16 at 707. Nothing further was noted in that report. *Ibid.* Claimant was seen by Dr. Barron again on September 5, 2003, at which time he reported less dyspnea since being on his medication. EX-16 at 708. However, he also reported that he was still unable to lift heavy items. *Ibid*. Dr. Barron's assessment of Claimant again included "cardiomyopathy," although he noted that Claimant "feels better on current regime." *Ibid*. He instructed Claimant to minimize his salt intake and to stop smoking. *Ibid*. Dr. Barron apparently saw Claimant one final time for a blood pressure check on September 19, 2003. EX-16 at 709. No other notations were recorded.

On cross-examination, Dr. Barron stated that he never treated or evaluated Claimant's hernia. EX-2 at 16. He said that his recommended restrictions, that Claimant only perform

light-duty work, were purely from a cardiological standpoint. EX-2 at 16-17. He noted that individuals with cardiomyopathy can improve their condition, and that Claimant's blood pressure "dropped nicely" after he began taking blood pressure medication. *Ibid*. In a note dated September 5, 2003, Dr. Barron wrote that Claimant reported less dyspnea since being on medication, but that he still could not lift heavy items. EX-2 at 18. He testified that Claimant's cardiac condition had improved since Claimant's first visit on August 12, 2003, and that his blood pressure was "good." *Ibid*. He further stated that he had no recollection of why he noted Claimant was depressed in his report dated August 25, 2003. EX-2 at 18-19. Finally, he stated that had Claimant undergone an echocardiogram as part of a pre-employment physical, the test would have determined whether or not he was suffering from cardiomyopathy at the time. EX-2 at 19.

Deposition and Records of Dr. Michael Graham (EX-3, EX-4, EX-5, EX-9)

Dr. Michael Graham was deposed by Employer/Carrier on July 25, 2006. EX-3 at 3. He is a Board-certified surgeon, licensed in Florida and specializing in the repair of hernias. EX-3 at 4; EX-4. He saw Claimant on January 16, 2003, after Claimant was referred to him by Carrier. EX-3 at 4-5. At that time, Claimant "complained mostly of a bulge in his upper abdomen" which he said happened as a result of work. EX-3 at 5-6. Dr. Graham performed a physical examination on Claimant, and diagnosed the bulge in his upper abdomen as "diastasis recti." EX-3 at 6; EX-5 at 221. He explained it as a benign, normal condition that is "just a widening of the upper abdomen." EX-3 at 6; *see also* EX-5 at 221. He also diagnosed Claimant as having an umbilical hernia of two-and-a-half centimeters across. EX-3 at 7; EX-5 at 221.

Dr. Graham explained that Claimant's hernia was "easily reducible and not in the area of pain" because Claimant "originally complained of pain in the upper abdomen and the umbilical hernia is in the mid-abdomen. . . . [U]sually when an umbilical hernia hurts, it hurts when you push on it." EX-3 at 7. He said that Claimant's hernia was benign on examination and did not seem to bother him. *Ibid*. He testified, "my feeling was that he didn't want anything done with it because I told him it didn't need anything done. It was probably chronic." EX-3 at 7-8. He told Claimant that he could go back to his regular work because there was nothing on the physical examination that indicated he should have any work restrictions. EX-3 at 9. He did not recommend any further treatment for the umbilical hernia because Claimant was asymptomatic, and the hernia was not strangulated or incarcerated. EX-3 at 9-10; EX-5 at 221.

Dr. Graham explained that a local anesthetic is typically used for the type of surgery he employs to repair an umbilical hernia. EX-3 at 11. He said that he rarely does the surgery using general anesthesia, because local anesthesia is "easier" and poses less of a risk to the patient. EX-3 at 12. However, he explained that "while general anesthesia is more invasive, there might be more anxiety with a local anesthetic if you had a preexisting cardiac condition." EX-3 at 12. He testified, "[t]he real reason for general anesthetic nowadays is if you need relaxation. You can't relax muscle, paralyzed muscles under local anesthesia. The patient wouldn't be able to breathe." EX-3 at 12-13. He said, that with general anesthesia "somebody is breathing for you." EX-3 at 13.

On cross-examination, Dr. Graham testified that he only saw Claimant on one occasion and that he did not diagnose his hernia through ultrasound. EX-3 at 14. He said that the hernia was obvious because Claimant "had a hole in his belly." *Ibid*. He further said that the 2.5 centimeter hernia he described in his report was an estimate. EX-3 at 15. Dr. Graham testified that the type of umbilical hernia Claimant had in January, 2003 could be aggravated by any type of lifting or carrying. EX-3 at 16. He said, however, that he noted in his report that Claimant could return to his regular job as a machinist because he assumed Claimant was already performing the job with the hernia and without pain. *See* EX-3 at 16. He further testified that Dr. Young's evaluation of Claimant on July 5, 2005 is consistent with his evaluation of Claimant in 2003. EX-3 at 17-18. He explained that the fact that both he and Dr. Young found Claimant's hernia to be easily reducible is a favorable finding, indicating that the hernia had not changed in two-and-a-half years and that Claimant therefore did not need surgery. EX-3 at 19-20.

Deposition and Records of Dr. Robert Comperatore (EX-6, EX-14)

Dr. Robert Comperatore was deposed by Employer/Carrier on July 15, 2005 (EX-6 at 2-3). He has been a Board-certified general surgeon for approximately 15 years, and is licensed in Florida. EX-6 at 3-4. Dr. Comperatore examined Claimant on July 15, 2003. EX-6 at 4. He diagnosed Claimant as having an "enlarging umbilical hernia," with a defect in the fascia of two centimeters. EX-6 at 4. He described it as an average hernia. EX-6 at 5. He was unsure whether an ultra-sound was used in his diagnosis, but explained an ultra-sound is not necessary. EX-6 at 4. He said a hernia diagnosis can be made "clinically by just looking at it. And making the patient cough, you see a bulging mass coming out. It's no mystery." *Ibid*. He explained that due to the large number of patients he sees every year, it would be "very taxing and very unnecessary" to locate Claimant's records to see whether an ultra-sound had been performed. EX-6 at 4-5.

After examining and diagnosing Claimant, Dr. Comperatore recommended that Claimant undergo surgical repair of the hernia to prevent "incarceration" and "strangulation," two life-threatening conditions. EX-6 at 5. He recommended that the surgery be done under general anesthesia, because the laparoscopic surgical technique used requires general anesthesia. EX-6 at 6. He explained that Claimant would be under anesthesia for approximately thirty minutes this way. EX-6 at 13. The only hernias he repairs under local anesthesia are "inguinal hernias," not umbilical hernias. EX-6 at 8. He explained that umbilical hernias are not done under a local anesthetic because the patient would suffer from pain and have more stress than under a general anesthetic. EX-6 at 8-9. He said he performs seven hundred to one thousand umbilical hernia procedures per year, and none of those are performed under local anesthesia. EX-6 at 12-13. He had not heard of any other local doctors performing the surgery under local anesthesia either. EX-6 at 13. With respect to Dr. Bilsker's recommendation to conduct the surgery under a local anesthetic, Dr. Comperatore noted, "I just don't think that this cardiologist is really knowledgeable about surgery because we don't do umbilical hernia repairs under local anesthesia." EX-6 at 7-8.

Dr. Comperatore stated that he would have deferred to a cardiologist as to whether or not Claimant could have cardiologically undergone a hernia surgery. EX-6 at 9. He said that if Claimant was not ultimately able to undergo the surgery under any anesthetic, he would not have

been at maximum medical improvement for the hernia. EX-6 at 9-10. He explained that hernias change with time, and that he would not provide impairment ratings or restrictions for Claimant unless he was able to evaluate him again. EX-6 at 10, 11. He said, however, that when he saw Claimant in 2003 he would have restricted him to the following: "No heavy lifting. And certainly . . . to fix the hernia before coming back to any kind of physical activity that demands to lift more than 25 pounds." EX-6 at 10. He went on to say:

> [Claimant] has a situation of liability with that hernia period. And it can be a sneezing; coughing; going to the bathroom; straining to urinate; or whatever the situation. It doesn't have to be work. Probably work wouldn't be as important as sneezing, coughing and straining, which are the ones that put hernias at risk the most. And the reason I can't give a scientific opinion is because some people live all their life with umbilical hernias and nothing happens.

EX-6 at 10-11. He said that the only non-surgical care for umbilical hernia is to lose weight, avoid lifting and to limit physical activity. EX-6 at 11.

Deposition and Records of Dr. Martin S. Bilsker (EX-12, EX-23)

Dr. Martin Bilsker was deposed by Employer/Carrier on September 12, 2006. EX-23 at 1-2. He is a cardiologist licensed to practice medicine in Florida and Board-certified in Echocardiography and Internal Medicine. EX-23 at 3; EX-23 Exhibit A. He performed an Independent Medical Examination of Claimant on behalf of Employer/Carrier on June 21, 2005. EX-23 at 3; EX-12. At that time, Claimant told Dr. Bilsker that he had "six months' worth of progressive shortness of breath." EX-23 at 5. Claimant also reported that he used to be physically active but, due to his shortness of breath, he could only walk one block. *Ibid*. Claimant further told Dr. Bilsker that he had to sleep in an elevated position to prevent his uvula from obstructing his breathing. *Ibid*. Claimant said that before his cardiomyopathy was discovered in conjunction with his pre-op evaluation for hernia repair, he did not know why he was short of breath. EX-23 at 6. Dr. Bilsker also reported that Claimant was obese, had a heavy smoking history, and that "[h]e had no real family history of cardiac disease." *Ibid*.

Dr. Bilsker noted that before he saw Claimant, Claimant had a cardiac catheterization done because of his decreased heart function. EX-23 at 6. He said that Claimant's other doctors found Claimant to have no coronary disease, and diagnosed him with "nonischemic cardiomyopathy." *Ibid*. Claimant was placed on initial doses of cardiac medications, however he never went back for follow up treatment. *Ibid*. Dr. Bilsker testified that his own assessment of Claimant's condition was that he had "dilated nonischemic cardiomyopathy. EX-23 at 7. He said that nothing in Claimant's exam indicated heart failure, but "[t]hat doesn't mean that he didn't have compensated heart failure." *Ibid*. He further testified, "it seemed like probably the pulmonary problem was more significant than the cardiac, but neither of them have been really treated to the maximum." *Ibid*. Dr. Bilsker said that Claimant's obesity and smoking may have both seriously impacted his medical condition, but without a pulmonary function test and a sleep study he could not be completely objective in his evaluation. EX-23 at 8.

Dr. Bilsker was aware of Claimant's hernia, and testified that repair surgery under a local anesthetic "shouldn't be any problem." EX-23 at 9. He further opined, "[Claimant] should have his medical condition optimally treated, just because it was completely elective surgery, but there shouldn't be any problem doing. . . . It is a low-risk procedure. It's fairly brief, and is not any significant cardio pulmonary strain for local anesthesia with sedation." EX-23 at 9-10. As far as restrictions he recommended for Claimant, Dr. Bilsker stated, "I wouldn't really say I would limit his activity. I would say he could do whatever he feels comfortable doing, but [he] probably . . . would be limited to a moderate level of work." EX-23 at 10.

Dr. Bilsker opined that whether or not Claimant could have undergone hernia surgery under general anesthesia depended on how much the hernia interfered with his life. EX-23 at 16. He testified, "[g]iven he didn't have mention that it was interfering with his activities, given that it didn't seem to be . . . on the top of his mind to mention to me, I wouldn't recommend purely elective surgery with somebody in his condition under general anesthesia." EX-23 at 16-17. He went on to explain that in order for him to have cleared Claimant for hernia surgery with a general anesthetic, he would have wanted "to treat him maximally for his heart failure for at least several months, refer him to a pulmonologist, who would do a pulmonary test, a sleep study." EX-23 at 17. He testified that at that point, Claimant would likely have had to decide whether to undergo the hernia surgery at a low-to-moderate risk. EX-23 at 18. He explained that the anesthesia would have been more of a risk to Claimant than the actual procedure. EX-23 at 18. Dr. Bilsker said he was unaware that the only doctor Employer/Carrier had authorized to perform Claimant's surgery recommended surgery under a general anesthesia. EX-23 at 19. He did not know that Employer/Carrier had not authorized a physician to perform Claimant's hernia surgery under a local anesthetic. *Ibid*.

In sum, Dr. Bilsker stated that although the hernia surgery is a low risk procedure, since Claimant's hernia was not an emergency situation his cardiac and pulmonary treatment should have been optimized first to make the procedure even lower risk to him. EX-23 at 22. He believed that Claimant had room for medical improvement to maximize his potential for a successful surgery. EX-23 at 23. He agreed that Claimant simply needed some minor "tweaking" of his medications before he could undergo the hernia repair under local anesthesia. EX-23 at 29. He further testified that Claimant's umbilical hernia was unrelated to his cardiac condition. EX-23 at 27-28.

Deposition and Records of Dr. Jerrold Young (EX-9, EX-20)

Dr. Jerrold Young was deposed by Employer/Carrier on August 17, 2006. EX-20 at 1, 3. He is a surgeon trained in general and vascular surgery, and he specializes in hernia surgeries. EX-20 at 3. He is licensed to practice medicine in Florida, and Board-certified in general surgery, "which encompasses hernias." EX-20 at 3. Dr. Young evaluated Claimant via an independent medical examination on behalf of Employer/Carrier on July 5, 2005. EX-20 at 4, EX-9 at 406. In preparation for the examination, he received records from the following doctors, medical centers and vocational counselors: Edward Garthwait, Dr. Robert Comperatore, Dr. Cardella, Dr. Howard Barron, Dr. Donald Caress[17], and Dr. Michael Graham. EX-20 at 4-5.

[17] The Court notes that Dr. Caress' medical records and/or deposition are not part of the case record.

Dr. Young testified that his review of Claimant's records indicated that Dr. Comperatore recommended laparoscopic surgery to repair Claimant's umbilical hernia. EX-20 at 7; *see also* EX-9 at 406. He noted that Dr. Baron, after examining Claimant's heart, felt Claimant would not be able to undergo general anesthesia and would thus not be a candidate for the surgery. *See* EX-20 at 7; *see also* EX-9 at 406. Dr. Young explained, "[l]aparoscopic hernia repairs have to be done under general anesthesia, but certainly if he had to have this hernia fixed, it could easily have been done with local and an anesthesia monitoring and sedation." EX-20 at 7. He noted that Claimant elected at that point not to have his hernia fixed. *Ibid*. He further noted that Claimant was "instructed to stop smoking, which he did for a while, and then apparently restarted which was a significant potential problem if he was going to have surgery." *Ibid*.

Dr. Young described his physical examination of Claimant as follows:

> Examination of his abdomen showed that this was markedly protuberant. There was a definite diastasis recti which was noticeabl[e] when he sits up or when he sat up from a recumbent position, but not really present when he was standing or laying down which is normal for a diastasis recti. There was no tenderness in the area. He had a 2.5 centimeter size umbilical hernia which was easily reducible and non-tender and I made a notation that that was similar to what Dr. Graham had described two and a half years before. There were no defects present within this diastasis recti area to suggest that there were actually hernias in that area.

EX-20 at 10-11; EX-9 at 407. Dr. Young explained that a hernia which is "easily reducible" is "less likely to get stuck, less likely to require operation, particularly on an urgent or emergent basis." EX-20 at 13. He further stated that a "non-tender" hernia, such as Claimant had, means "it's less likely to create a problem." *Ibid*. He said that there were no signs the hernia had progressed or gotten worse over the two-and-a-half-year period since Dr. Graham examined him. *See* EX-20 at 13.

Dr. Young testified that his ultimate impression of Claimant was that "he had an umbilical hernia which was not incarcerated or stuck and that he essentially had no symptoms related to it at that time. He also had a diastasis recti in which most cases . . . are asymptomatic and generally not surgical problems." EX-20 at 13-14. He explained that a diastasis recti is not a "true hernia," and that "there's almost never any pain associated with it." EX-20 at 15. He further stated, "it would actually . . . be . . . [a] contraindication to surgery because it [] essentially becomes something cosmetic and you'd have to go in and open up that and then you would leave the patient with a greater chance of actually getting a true hernia. So we don't operate on these." EX-20 at 15-16. He explained that one can be born with the condition, or that the condition might occur as a result of significant weight gain or smoking. EX-20 at 15-16. He said that when smokers cough they pull and stretch their abdominal muscles. EX-20 at 16. Moreover, smoking causes a collagen deformity in patients, which means that the tissue is "weaker so it will stretch out." *Ibid*.

Dr. Young testified that he does not believe Claimant's diastasis recti condition was related to either of his work incidents. EX-20 at 16-17; *see also* EX-9 at 407-408. He explained that the condition generally occurs over a long period of time and is more related to other factors. EX-20 at 17. He also opined that Claimant's umbilical hernia was not related to either of his work accidents. EX-20 at 17; EX-9 at 407-408. He said:

> Generally when someone develops a hernia related to a specific injury he . . . would generally report a significant amount of pain in the area of the hernia. If you have a specific injury and you have a tear that subsequently results in hernia or results in a hernia immediately, I've never seen a patient who had that that didn't have pain at the time of the specific injury in the area where the hernia developed. So . . . from what I could gather from the records there's never an indication that he had pain specifically at the umbilical area. . . . One of Dr. Cardella's notes indicates that he had a 'ventral hernia' in the area of the umbilicus. I don't know obviously he's referring to the hernia, umbilical hernia, and I guess one could refer to umbilical hernia as ventral hernia which is any hernia in the abdominal wall, but there's no indication that that was the area that the patient was having, specifically having pain at the time of any of the injuries.[18]

EX-20 at 19.

Dr. Young explained that umbilical hernia results from essentially the same reasons as diastasis recti. *See* EX-20 at 21. Sometimes people are born with it, other times it results from significant weight gain, smoking or heavy lifting over a long period of time. EX-20 at 21. In this case, he believes Claimant's smoking and weight gain were the most significant factors in causing his umbilical hernia. EX-20 at 21-22.

Just as he testified he would not recommend surgery for Claimant's diastasis recti, Dr. Young testified that he would not recommend repair surgery for Claimant's umbilical hernia. EX-20 at 22-23. He explained that the risks outweighed the potential benefits of surgery since Claimant was asymptomatic for a two-and-a-half-year period, and had been given no limits in terms of what he could lift. EX-20 at 23. He said that Claimant was a heavy smoker and "markedly overweight, which "would make his surgery much more difficult and the chance for recurrence much greater." *Ibid.* A further surgery risk was Claimant's cardiac condition. *Ibid.* Dr. Young concluded:

> [I]f he were really symptomatic, had to have surgery, we could do it and I would do it under local with sedation and there have been many patients we've done the hernia was not that big. So it wouldn't have been all that hard to do under local. I do not do

[18] Later, on cross-examination, Dr. Young testified that subsequent to Claimant's June incident, he complained of tenderness in the area of his belly button. EX-20 at 47-48. He agreed that such pain is consistent with Claimant experiencing pain at the umbilicus where he found Claimant's hernia. EX-20 at 48.

> laparoscopic hernia repair, particularly for umbilical hernias and I disagree with Comperatore's recommendation.

EX-20 at 24.

Dr. Young explained that he does not use the laparoscopic method for umbilical hernias because umbilical hernias are "really simple procedures" and "when you try to do something really simple in a complicated way you end up with problems that you don't need." EX-20 at 24. He did note, however, that there are "a few people that do umbilical hernias with laparoscope," and that Dr. Comperatore's recommendation did not fall below community standards. EX-20 at 24, 52. Dr. Young further noted that he and Dr. Graham concurred that Claimant should not have any work restrictions based on their physical findings. EX-20 at 26. He stated, "[Claimant] had had [the hernia] for a long period of time and he was not having any symptoms related to it and I didn't think there would be any reason to limit his work based on that." *Ibid*.

On cross-examination Dr. Young testified that he does approximately two or three independent medical exams a year. EX-20 at 32. He could not recall whether he had ever been retained by Carrier to perform an exam, and he did not believe he had ever been retained by Employer/Carrier's lawyer or firm. EX-20 at 31-32.

Dr. Young testified that he had no records of Claimant's hernia diagnosis predating November, 2002. EX-20 at 32, 37. He explained that the doctors who evaluated Claimant after his November, 2002 injury were evaluating his upper abdomen for acute injury. EX-20 at 33-34. He said that he evaluated Claimant to see whether or not he had a hernia or diastasis recti. EX-20 at 34. He stated that he never called Dr. Caress or his PA to get clarification as to the onset of Claimant's pain they recorded, because he does not believe "they would have had any recollection other than what their notes would be." *Ibid*.

Dr. Young said it was possible for Claimant to have injured himself in November, 2002 and for the hernia not to surface until January, 2003 when Claimant was diagnosed by Dr. Graham. EX-20 at 37. He testified that the incident of November, 2002 could have caused, aggravated or accelerated Claimant's hernia that was subsequently diagnosed in January, 2003. EX-20 at 39. He further stated that when people are asymptomatic, such as Claimant was when he examined him, they frequently have a reduced level of functioning. EX-20 at 45. He said that he did not know whether Claimant had been lifting heavy objects prior to his examination that contributed to Claimant's "asymptomatology." EX-20 at 45. He further said that if Claimant went back to work lifting heavy objects and experienced hernia symptoms, he "might put him on restriction of lifting and pulling no more than 20 pounds." EX-20 at 45-46.

Records of Dr. Cardella/ Concentra Medical Center (EX-10)

Employer's Exhibit 10 consists of Claimant's medical records from the Worker's Compensation Medical Center in Ft. Lauderdale, Florida. EX-10. Dr. R.E. Cardella first examined Claimant on November 25, 2002, after Claimant's first work injury. EX-10 at 507, 536, 543. He noted that Claimant's chief complaint was "pain in chest/stomach area," and that Claimant had symptoms of sufficient severity. EX-10 at 543. His examination report notes that

Claimant was then in no acute distress, and that he complained of a pain level of approximately three-to-four out of ten. EX-10 at 536. He wrote, "[Claimant's] past medical history is noncontributory." *Ibid*. He recorded that Claimant had "mild to moderate tenderness," and that "there appears to be no palpable defect or hernia detected." *Ibid*. He noted that an X-ray of Claimant's abdomen was "essentially unremarkable," and diagnosed Claimant with "abdominal strain." *Ibid*. He recommended that Claimant be placed on modified activity and that he lift, push and pull no more than thirty pounds. EX-10 at 507, 536. He also instructed Claimant not to climb, squat or kneel. *Ibid*. His recommended treatment was to "arrange physical therapy for 6 visits to decrease inflammation and improve strength." EX-10 at 536. He also advised Claimant to take Tylenol as needed. *Ibid*.

Claimant had a follow-up visit with Dr. Cardella on December 3, 2002. EX-10 at 503, 531. He noted: "Patient is feeling better. Pain level is 0 in regards to muscle ache. He has soreness between meals. . . . There is a diasthetic retro hernia which is preexisting to this recent abdominal stain injury according to the patient." EX-10 at 531. He further noted, "there is tenderness in the epigastric area but no rebound tenderness. Abdomen is soft, bowel sounds are present." *Ibid*. Dr. Cardella's follow-up diagnosis reads, "resolved abdominal wall strain, probable upper GI bleed secondary to peptic ulcers." *Ibid*. Claimant was discharged and allowed to return to regular work and home activities. EX-10 at 503, 531.

Dr. Cardella examined Claimant again on June 20, 2003, after Claimant's second work injury. *See* EX-10 at 490-496. Claimant's chief complaint was "constant pain to stomach," and Claimant was experiencing symptoms of "sufficient severity," including "severe pain." EX-10 at 492. He recorded that Claimant felt pain in his mid-abdominal area after lifting a pair of steel bars, and that his pain level at the time of the exam was "4/10." EX-10 at 493. Dr. Cardella diagnosed Claimant with a "ventral hernia at the umbilicus." EX-10 at 491. He noted that his diagnosis was related to Claimant's on-the-job injury. *Ibid*. At the time, he recommended that Claimant return to work on modified duty. *Ibid*. He instructed Claimant to avoid lifting or straining more than 15 pounds, to avoid bending over repeatedly and to continue taking Aleve as necessary at home. EX-10 at 491, 493. He also referred Claimant back to his general surgeon for further evaluation and treatment. EX-10 at 491.

Claimant had a follow-up appointment with Dr. Cardella on June 25, 2003. EX-10 at 588. Dr. Cardella noted that Claimant was "feeling the same at 7-8/10 pain," and that his "pain gets better when he eats." *Ibid*. He recorded that Claimant had "no umbilical tenderness," but that he still had "umbilical ventral hernia." *See* EX-10 at 588. Dr. Cardella instructed Claimant to be seen that day for his upper abdominal pain. EX-10 at 588. He also instructed Claimant to avoid acidic and spicy foods. *Ibid*. He restricted Claimant to no lifting or straining more than 20 pounds. *Ibid*.

Records of Dr. George Borrero[19] / Real-Time Medical Imaging (EX-15, 18[20])

This exhibit consists of a radiology report of an abdominal ultrasound conducted on Claimant on July 2, 2003 and interpreted by Dr. George Borrero. EX-15 at 699. The report indicates that at the time, Claimant was under the care of Dr. Braver. *Ibid*. It states the following:

> Transverse and sagittal sections are obtained. There is no evidence of cholelithiasis or gallbladder wall thickening. No focal abnormalities are seen in the liver or pancreatic bed. There is no intra or extra hepatic bile duct dilatation. There is a 2 cm cyst in the lower part of the right kidney, noted incidentally.

Ibid. Dr. Borrero recorded the following impression: "No focal abnormality seen in the liver, pancreatic bed or within the gallbladder." *Ibid*.

Records of Broward General Hospital (EX-17[21])

This exhibit indicates that Claimant was admitted to Broward General Medical Center on April 26, 2000 due to a pelvic injury. EX-17 at 713-714, 725. Apparently, Claimant was injured during work that day when a large, heavy beam fell on his pelvic region. *See* EX-17 at 715-716, 718. A radiology report of Claimant's pelvic region notes that "[t]here is no evidence of fracture dislocation or radiopaque foreign body identified." EX-17 at 721. Claimant was released that day and instructed to rest at home, use ice, take Tylenol and to follow-up with his primary doctor. EX-17 at 722.

IV. DISCUSSION

Claimant based his claim for medical and disability benefits under the Act on two work-related incidents, which he alleged caused his umbilical hernia. The first allegedly occurred on November 23, 2002 while Claimant was lifting heavy equipment. *See, e.g*., Tr. at 7. The second injury allegedly occurred on June 16, 2003, in substantially the same way. *Id*. As explained below, I find the issue of medical benefits to be moot. As further explained below, I find that Claimant proved the work-relatedness of his injury by a preponderance of the evidence, but that he failed to establish that his injury resulted in disability. Thus, I will deny his claim for disability benefits.

[19] The Court notes that Employer/Carrier designated EX-17 as "Medical Records – George Borrero, M.D." However, it appears that EX-17 instead consists of records from Broward General Hospital. Dr. Borrero's records are apparently combined with the records of Real-Time Medical Imaging in EX-15 and EX-18.

[20] The Court notes that EX-15, titled "Medical Records – Broward General Hospital," and EX-18, "Record from Real-Time Medical Imaging," consist of the exact same memorandum dated July 2, 2003 and interpreted by Dr. George Borrero.

[21] The Court notes that Employer/Carrier designated EX-17 as "Medical Records – George Borrero, M.D." EX-17, however, consists of records from Broward General Hospital.

Entitlement to Medical Benefits

In *England v. Sea Ray Boats* the Board stated the following with regard to a claimant's entitlement to medical benefits:

> A claimant's entitlement to medical benefits is governed by Section 7 of the Act. 33 U.S.C. §907. In order for medical care to be compensable it must be appropriate for the work injury and related to it. *Turner v. Chesapeake & Potomac Telephone Co.*, 16 BRBS 255 (1984). It is well established that claimant need not be economically disabled in order to be entitled to medical benefits. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT)(5th Cir. 1993); *Romeike v. Kaiser Shipyard*, 22 BRBS 57 (1989); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). Rather, claimant need establish only that medical care is reasonable and necessary for the treatment of the work injury. *See generally Baker*, 991 F.2d 163, 27 BRBS 14(CRT); *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

BRB No. 06-0279 (Sept. 22, 2006) (unpublished).

As noted above, Claimant passed away from an unrelated condition following the hearing. Although I have determined that Claimant suffered from a work-related hernia, there are no outstanding medical bills noted in the record with respect to that condition. Nor is there a possibility that Claimant will need any future medical care related to his hernia since he is now deceased. I thus find that medical care is not reasonable or necessary for the treatment of Claimant's work injury. Moreover, there is no evidence that Claimant's cardiac and pulmonary conditions were work-related, or aggravated or exacerbated by his hernia. Even if that were the case, there are no outstanding medical bills for cardiac and pulmonary treatment that Claimant received, and there is no possibility that such care will be needed in the future. I therefore find that the issue of whether Employer/Carrier was responsible for providing cardiac care for Claimant's underlying condition is now moot. Thus, the issue left for decision is whether Claimant would have been entitled to disability benefits.[22]

[22] The record does not establish that Claimant has any survivors who might be eligible for benefits. According to Section 908(d)(1)(D) of the Act, when an injured employee dies leaving no survivors, any subsequent award of disability benefits shall be payable to the "the special fund established under section 44(a) of this Act [33 USC § 944(a)]."

Entitlement to Disability Benefits

Injury Arising Out of[23] and In the Course of Employment[24]

As a preliminary matter, I find that Claimant has presented a claim based on an initial injury theory alone; and that an alternative theory of aggravation does not apply here. Nowhere in the record did Claimant ever assert that a pre-existing hernia may have been aggravated during his employment with Employer. Neither did Claimant assert, nor does the medical evidence suggest, that his heart condition was aggravated or exacerbated by the incidents causing his hernia. Rather, Claimant's case rests exclusively on allegations and evidence suggesting that his hernia was caused in two separate incidents while working for Employer, and that his hernia was not pre-existing.[25]

The 20(a) Presumption

According to Section 20(a) of the LHWCA, "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary . . . [t]hat the claim comes within the provisions of this Act." 33 U.S.C. § 920(a). "Section 20(a) . . . provides claimant with a presumption that his injury is causally related to his employment if claimant establishes a harm and that working conditions existed or an accident occurred which could have caused, aggravated or accelerated the harm." *Uglesich v. Steverdoring Servs. of Am.*, 24 B.R.B.S. 180, 182 (1991) (*citing Blake v. Bethlehem Steel Corp.*, 21 B.R.B.S. 49 (1988).

Once the claimant establishes these elements of a *prima facie* case, the Section 20(a) presumption applies to link the harm with the claimant's employment. *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985). This statutory presumption applies to the issue of whether an injury arises out of and in the course of employment. *Travelers Ins. Co. v. Donovan*, 221 F.2d 886 (D.C. Cir. 1955) (*citing O'Leary v. Brown-Pacific Maxon*, Inc., 340 U.S. 504 (1951)). It is grounded in the humanitarian purpose of the LHWCA, favoring awards in arguable cases. *Leyden v. Capitol Reclamation Corp.*, 2 BRBS 24 (1975), *aff'd mem.*, 547 F.2d 706 (D.C. Cir. 1977).

---

[23] The "arising out of employment" language of the LHWCA refers to the causal connection between the claimant's injury and an employment-related risk. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). Whether an injury arises out of one's employment refers to the cause or the source of the injury, *Mulvaney v. Bethlehem Steel Corp*., 14 BRBS 593 (1981), and the necessary causative nexus is established when there is "a causal relationship between the injury and the business in which the employer employs the employee—a connection substantially contributory though it need not be the sole or proximate cause." *Cudahy Packing Co. v. Parramore*, 263 U.S. 418, 423-24 (1923).

[24] "Course of employment" refers to the time and place of the injury, as well as the activity in which the claimant was engaged when the injury occurred. *Mulvaney v. Bethlehem Steel Corp.*, 14 BRBS 593, 595 (1981) (as the claimant was injured on the work premises during working hours, the injury occurred within the time and space boundaries of the employment).

[25] Employer/Carrier does list as one of the issues: "Whether Claimant's alleged pre-existing injuries have . . . combined with the incidents herein, entitling Employer/Carrier to Section 8(f) relief." ALJX-3 at 2. As noted above, this issue is moot. *See supra* note 7.

The Section 20(a) presumption does not apply, however, to aid the claimant in establishing his *prima facie* case. The claimant must establish a *prima facie* case by proving that he suffered some harm or pain, *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979), and that an accident occurred or working conditions existed which could have caused the harm. *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). *See U.S. Industries/Federal Sheet Metal v. Director, OWCP (Riley)*, 455 U.S. 608, 14 BRBS 631, 633 (1982), *rev'g Riley v. U.S. Industries/Federal Sheet Metal*, 627 F.2d 455, 12 BRBS 237 (D.C. Cir. 1980); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT) (5th Cir. 1998); *Bolden v. G.A..T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993). It is the claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994). Therefore, like any other element of his case to which a presumption does not apply, the claimant has the burden of establishing harm, and the existence of an accident that could have caused his harm. In other words, before availing himself of the Section 20(a) presumption, Claimant must establish that the incidents claimed to be the cause of his injury in fact occurred.

Once the claimant has established a *prima facie* case, thus invoking the presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *Peterson v. General Dynamics Corp.*, 25 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Davidson v. Bender Shipbuilding & Repair Co.*, Inc., 30 BRBS 45, 46-47 (1996). If the presumption is rebutted, then all relevant evidence must be weighed to determine if a causal relationship has been established, with the claimant bearing the burden of persuasion. *See, e.g.*, *Meehan Service Seaway Col, v. Director*, OWCP, 125 F.3d 1163, 31 BRBS 114 (CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

Applying this law to the instant case, I find that Claimant has presented a *prima facie* case and is thus entitled to the 20(a) presumption. As stated above, a *prima facie* case under the Act has two prongs. To meet the first prong, a claimant must show that he suffered harm or pain. Here, Claimant has clearly shown he suffered pain while working for Employer.[26] Claimant testified that on two separate occasions while he was engaged in strenuous physical labor at work, he immediately felt a terrible pain in his abdomen. *See* Tr. at 29-32. In addition to Claimant's own account of his injuries, the doctors who evaluated him following the incidents all noted injuries to his abdomen. Dr. Cardella examined Claimant after his first work injury in November, 2002. Although he did not diagnose Claimant with a hernia at that time, he noted that Claimant had "mild to moderate tenderness" and diagnosed him with abdominal strain. EX-10 at 536. He also recommended that Claimant be placed on modified activity. EX-10 at 507, 536. Dr. Graham subsequently examined Claimant in January, 2003 and diagnosed him with

[26] The Court notes that an injury is sustained where a claimant has experienced some harm or pain. *See Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968 (*en banc*). The claimant's burden does not include establishing an injury as defined in Section 2(2) of the LHWCA. It has been held that to place such a burden on the claimant would be contrary to the well-established rule that the Section 20(a) presumption applies to the issue of whether an injury arose out of and in the course of employment. *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 at 329. In addition, an injury need not be traceable to a definite time, but can occur gradually over a period of time. *See Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986).

"diastasis recti" and an umbilical hernia measuring two-and-a-half centimeters. EX-3 at 6-7. He further noted that the type of umbilical hernia Claimant had at the time could be aggravated by any type of lifting or carrying. EX-3 at 16. After Claimant re-injured himself in June, 2003, he was again evaluated by Dr. Cardella who diagnosed him with a "ventral hernia at the umbilicus." EX-10 at 491. He was also seen by Dr. Comperatore in July, 2003 who diagnosed Claimant with an "enlarging umbilical hernia" and recommended surgical repair. EX-6 at 4-5. Accordingly, I find that Claimant has established he suffered harm to his abdomen and has satisfied the first prong of the 20(a) presumption.

In order to satisfy the second prong of a *prima facie* case, Claimant must establish by credible evidence that the alleged incidents did in fact occur and that they could have caused his harm. Since I have no reason to believe Claimant is not a credible witness, since Claimant immediately filed accident reports with Employer detailing his injuries, and since all of the above-mentioned doctors provided identical accounts of Claimant's injuries, I find that the alleged incidents have been established. Moreover, I find that Claimant was performing the type of work (i.e. pulling on a chain wrench to disassemble a boat propeller and lifting a heavy piece of steel) that could have caused his injuries. Thus, Claimant has presented a *prima facie* case and is entitled to the 20(a) presumption that his hernia was work-related.

Employer's Rebuttal

As noted above, once the claimant has invoked the Section 20(a) presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *Peterson v. General Dynamics Corp*., 25 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Davidson v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45, 46-47 (1996). Substantial evidence is "the kind of evidence a reasonable mind might accept as adequate to support a conclusion." *Travelers Ins. Co. v. Belair*, 412 F.2d 297 (1st Cir. 1969); *John W. McGrath Corp. v. Hughes*, 264 F.2d 314 (2d Cir.), *cert. denied*, 360 U.S. 931 (1959).

Here, there are only implicit, unsubstantiated suggestions that Claimant's hernia *may* have pre-existed his employment. First, Dr. Cardella noted that, at Claimant's follow-up visit in December, 2002, Claimant told him he had a pre-existing "diasthetic retro hernia." EX-10 at 531. In his first evaluation of Claimant in November, 2002, however, he wrote that "Claimant's past medical history [was] noncontributory" to his then injury. EX-10 at 536. Furthermore, he expressly attributed Claimant's hernia to his work injury when he again examined claimant in June 2003. EX 10 at 491. Second, Dr. Young, who conducted an independent medical exam of Claimant in July, 2005, suggested that Claimant's injuries were not work-related. He opined that Claimant's diastasis recti and hernia conditions were instead caused by Claimant's smoking and weight gain. EX-20 at 16-21. On cross-examination, however, Dr. Young expressly

acknowledged that the incident of November, 2002 could have caused, aggravated or accelerated Claimant's hernia that was subsequently diagnosed in January, 2003.[27] EX-20 at 39.

None of the other doctors who evaluated Claimant and diagnosed him with a hernia and/or diastasis recti suggested that the conditions were pre-existing. Given Dr. Cardella's statement in June 2003 associating Claimant's hernia with his on-the-job injury, and Dr. Young's equivocation on the cause of Claimant's hernia, I find that Employer has not produced substantial evidence to successfully rebut the presumption that Claimant's hernia is work related. I thus further find that Claimant has demonstrated by a preponderance of the evidence that his injury arose out of and in the course and scope of his employment with Bradford Marine, Inc.

Nature and Extent of Claimant's Alleged Injuries.

"Disability" under the LHWCA means incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment. 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have a physical or psychological impairment coupled with an economic loss. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to either have no loss of wage-earning capacity, no present loss but with a reasonable expectation of future loss (*de minimis*), a total loss, or a partial loss. For non-scheduled injuries, such as Claimant's hernia, loss of wage-earning capacity is an element of the claimant's case, for without the presumption that accompanies scheduled injuries, a claimant is not "disabled" unless he proves "incapacity because of injury to earn the wages." 33 U.S.C. § 902(10); *Bath Iron Works Corp.*, 506 U.S. at 153, 26 BRBS 151 (CRT).

Physical Impairment

Drs. Cardella and Graham both evaluated Claimant after his initial injury. Dr. Cardella diagnosed Claimant with "abdominal strain" and recommended that Claimant not lift, push or pull more than 30 pounds. EX-10 at 507, 536. However, in a follow-up visit the next week, he discharged Claimant without restrictions and allowed him to return to his regular work activity.

[27] Furthermore, while he noted that Claimant was asymptomatic with respect to his hernia at the time of the 2005 examination, *see, e.g.*, EX 20 at 13-14, 23, EX 9 at 407, he acknowledged during his deposition that one of the causes of hernias is working with, or lifting, heavy objects and that Claimant's work could have caused his hernia. EX 20 at 37 Despite these admissions, he concluded that Claimant's hernia was not work-related based on the lack of any complaints of pain associated with Claimant's injury. EX 20 at 39-41. Claimant, however, clearly testified that he never had abdominal pain before his work injuries and experienced substantial pain at the time of his injuries in November 2002 and June 2003. *See, e.g.*, Tr. 29-30. Similarly, various physicians noted complaints of pain or tenderness related to the hernia in their treatment records. *See, e.g.*, EX 5 at 195 (6/20/03 - "felt pain in the mid abdominal area, it grew worse the next few days and eventually he went to Memorial Hospital . . . ," "there is tenderness [on examination] in the peri umbilical area . . . ."); EX 5 at 196 (6/25/03 - "patient is 5 days into treatment. Feeling the same at 7-8/10 pain . . . He has been taking Percocet and took Aleve twice."); EX 5 at 221 (1/16/03 - "working on a shaft in a yacht and with manipulation and pulling he felt some pain in the upper abdomen and midline," "asymptomatic at the present time."); EX 5 at 225 (12/03/02 - "tenderness in the epigastric area . . . ," "resolved abdominal strain"); EX 5 at 227 (11/25/02 - "Patient was working on a boat 2 days ago when through lifting some mechanism he injured his abdomen," "Complaints of pain level approximately 3-4/10," "Physical exam is significant for patient having mild to moderate tenderness of the mid epigastric region . . . .").

EX-10 at 503, 531. Dr. Graham testified that Claimant's hernia was "easily reducible and not in the area of pain." EX-3 at 7. He further stated that Claimant's hernia did not seem to bother him and was benign on examination. *Ibid.* Like Dr. Cardella, Dr. Graham sent Claimant back to work with no restrictions. EX-3 at 9. Moreover, he did not recommend further treatment for Claimant's hernia because Claimant was asymptomatic and the hernia was not strangulated or incarcerated. EX-3 at 9-10.

After Claimant re-injured himself in June, 2003, Dr. Cardella again examined Claimant. EX-10 at 490-496. He diagnosed him with a "ventral hernia at the umbilicus," and recommended that Claimant return to work on modified duty. EX-10 at 491. In Claimant's follow-up visit that same week, Dr. Cardella noted that Claimant had "no umbilical tenderness," but he restricted Claimant to "[n]o lifting or straining more than 20 pounds." EX-10 at 588.

Claimant was also evaluated by Dr. Comperatore on July 15, 2003, who recommended surgery for Claimant's "enlarging umbilical hernia" to prevent "incarceration" or "strangulation" of the hernia, either of which can be a life-threatening event. *See* EX-6 at 5. Although, he only saw Claimant on that one occasion, and did not place any restrictions on him at that time, he subsequently testified that Claimant's condition justified restrictions of lifting no more than 25 pounds. *See* EX-6 at 10.

Dr. Barron first examined Claimant on August 12, 2003 for his cardiopulmonary condition and never treated or evaluated Claimant's hernia. EX-2 at 16.

Dr. Bilsker performed an IME of Claimant in June 2005 to evaluate his cardiac condition. EX 25 at 4, 16. Based on his physical examination and records review, he recommended that Claimant lift, at most, 10 to 20 pounds "just briefly, from a floor to a chair, floor to a table." *Id.* at 11. He did not specify whether those restrictions were appropriate based on his cardiac condition, his hernia, or both.

Dr. Young performed an IME of Claimant in July 2005. He noted, *inter alia*, that Claimant had a 2.5 centimeter size umbilical hernia which was easily reducible similar to what Dr. Graham had observed. EX-20 at 10-11; EX-9 at 407. He further noted that Dr. Graham had not imposed any physical restrictions due to Claimant's hernia, and that he did not recommend surgery. EX 20 at 23-26. His IME report states that he "concur[s] with Dr. Graham's recommendation that this [hernia] is essentially asymptomatic, probably not work related and would not require any type of surgery." EX 9 at 407. He further "suggested" that Claimant "not have any work restrictions based on his abdominal examinations . . . ." *Id.* at 408.

In reaching these conclusions, Dr. Young seems to have ignored the fact that Dr. Graham had only seen Claimant once, that Dr. Graham's examination of Claimant occurred before his second injury, and that Drs. Cardella and Comperatore, who examined Claimant after his second injury, believed that physical restrictions prohibiting heavy lifting were appropriate in light of Claimant's condition. While Dr. Young did note Dr. Comperatore's recommendation for surgical repair of the Claimant's hernia, and that he disagreed with that recommendation, he did not explain why the physical restrictions recommended by Dr. Comperatore and other physicians were inappropriate or unnecessary with respect to avoiding any aggravation or exacerbation of

Claimant's umbilical hernia should he attempt to engage in the strenuous physical work he was performing before his injuries. *See, e.g.*, Tr. 28-29, 80; EX 1 at 23-24 (carried 200 pound "coupler" down steps; normally lifted objects weighing up to 100 pounds and more; job required pushing and pulling as well as heavy lifting). These omissions clearly diminish the value of his conclusion that Claimant suffered no lasting impairment related to his hernia.

Based on the foregoing, I find that Claimant has established his hernia caused some physical impairment which limited his ability to perform the physically demanding job in which he was employed prior to his injuries. Drs. Cordella, and Comperatore each concluded that Claimant's hernia justified the imposition of certain physical restrictions, and Employer voluntarily modified Claimant's duties at work thereafter to accommodate those restrictions. Although Dr. Young opined that Claimant's hernia resulted in no physical impairment, his reliance on the examination and findings of Dr. Graham, and his failure to address the findings and conclusions of the physicians who examined and treated Claimant after his second injury, diminishes the probative value of his opinion. No other physician who evaluated Claimant's hernia suggested that Claimant was capable of working without restrictions. Dr. Barron never treated or evaluated Claimant's hernia, and Dr. Bilsker recommended physical restrictions without stating whether they were due, in whole or in part, to Claimant's hernia. Claimant has thus met his burden of proving this element of disability. I thus find that Claimant has proven a work-related physical impairment.

Economic Loss

Although Claimant has shown that he suffered a physical impairment which was caused by his work-related injuries, the evidence demonstrates that no economic loss resulted from those injuries. After he was injured the first time, in November 2002, he went back to work under normal conditions[28] until he re-injured himself in June 2003. Tr. at 31, 70-72, 80; EX-1 at 40. Following the June 2003 hernia diagnosis, he went back to work for Employer in a light-duty capacity earning his same pre-injury wages. *See* Tr. at 41-43, 81; EX-21 at 6-7; EX-22 at 6-7. Claimant continued to work for Employer for nearly a year thereafter until he was let go on April 2, 2004 because of a lack of work. *See, e.g.*, EX 21 at 8; EX 22 at 7-8.

The Board has held that when a claimant has a physical impairment from the injury but is doing his usual work adequately, regularly, full-time, and without due help, the ALJ may find that the employee's actual wages fairly represent his wage-earning capacity, and he has suffered no loss and therefore is not disabled. *See* 33 U.S.C. § 908(h); *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 194 (1984). The Board has also held that if a claimant is offered a job at his pre-injury wages as part of his employer's rehabilitation program, the judge can find that there is no lost wage-earning capacity and that the claimant therefore is not disabled. *Swain v. Bath Iron Works Corp.*, 17 BRBS 145, 147 (1985) ("The employer carried its burden of producing evidence of suitable alternative employment by offering claimant two light duty clerical jobs at the same wage level claimant earned prior to injury."). Moreover, a job specifically tailored to the employee's restrictions is not sheltered so long as it involves

[28] Claimant initially went back to work on "light-duty" for a couple of weeks, but he received his normal pay. *See* EX-1 at 39. He then returned to his regularly assigned duties (and continued receiving his normal pay) for approximately six months. Tr. at 31, 70-72, 80.

necessary work. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 226 (1986).

Here, Claimant was making his pre-injury wages after his November 2002 and June 2003 injuries, and there is no indication that the modified work he performed for Employer thereafter was not necessary. *See, e.g.* Tr. at 81. Furthermore, there is no suggestion in the record that Claimant was terminated from his employment for any reason other than that Employer maintained a seasonal work force and had a reduced work load at the time. *See, e.g.*, EX-21 at 8; EX-22 at 7-9. Because Claimant was able to continue working for Employer at his pre-injury salary, and because he suffered no economic injury,[29] I find that Claimant has failed to establish he suffered a "disability" within the meaning of the Act.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that the claim of D.A.W. for medical and disability benefits is DENIED.

A

STEPHEN L. PURCELL
Associate Chief Judge

Washington, D.C.

[29] Even after Claimant's termination, the record indicates there were ample alternative employment opportunities for Claimant. Two vocational counselors testified that there were jobs within Claimant's skill level that likely would have been appropriate for Claimant. *See* Tr. at 99-102; EX-11 at 615. Although Susan Lazarus was more hesitant than Edward Garthwait to recommend suitable alternative work for Claimant, even Ms. Lazarus testified that, if Claimant could perform light-duty work, he could work as a security guard or a machinist. *See* Tr. at 100, 102. Both agreed that Claimant's physical complaints and restrictions were likely due to his pre-existing cardiac and pulmonary conditions rather than his hernia. *See* Tr. at 108, 122-123, 141-142, 144-145, 150.